

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In Re Application of)	
)	
KB PRIME MEDIA, LLC)	
(Assignor))	
)	
and)	File No. BALCT-20040227AAA
)	Facility ID No. 48408
PEGASUS SATELLITE COMMUNICATIONS,)	
INC., DEBTOR-IN-POSSESSION)	
(Assignee))	
)	
For Consent to Assign the License of Station)	
WPME(TV), Lewiston, Maine)	

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 2005

Released: February 10, 2005

By the Chief, Media Bureau:

I. Introduction

1. We herein consider, pursuant to delegated authority, the above-captioned application of KB Prime Media, LLC ("KB Prime"), for consent to assign the license of station WPME(TV), Channel 35 (UPN), Lewiston, Maine to Pegasus Satellite Communications, Inc., Debtor-in-Possession ("WPME Corp."), a subsidiary of Pegasus Communications Corporation ("PCC").¹ PCC also owns HMW, Inc., the licensee of WPXT(TV), Channel 51 (WB), Portland, Maine. Through another subsidiary, B.T. Satellite,

¹ In the application as originally filed the proposed assignee was WPME License Corp. By amendment filed July 1, 2004, WPME License Corp. substituted Pegasus Satellite Communications, Inc., Debtor-in-Possession, as the proposed licensee. Both WPME License Corp. and Pegasus Satellite Communications, Inc., Debtor-in-Possession, are subsidiaries of Pegasus Communications Corporation. The amendment also reported that, on June 2, 2004, Pegasus Satellite Communications, Inc., along with certain other affiliated companies, submitted a voluntary petition for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code, and is now operating as a debtor-in-possession under the Bankruptcy Court's oversight.

Inc., PCC currently programs station WPME(TV) pursuant to a time brokerage agreement. This application is unopposed.

2. Common ownership of stations WPXT(TV) and WPME(TV) would violate the Commission's duopoly rule because both stations are located in the Portland-Auburn, Maine, Designated Market Area ("DMA"), which will not have eight operating independently owned commercial and noncommercial television stations post-merger. Moreover, the stations' Grade B signal contours overlap.² Although station WPME(TV) is a licensed station and has been operating since August 13, 1997, WPME Corp. seeks to acquire it pursuant to an unbuilt station waiver of the television duopoly rule, as set forth in Note 7 of Section 73.3555 of the Commission's rules.³

II. Duopoly Waiver

3. In its *Local Ownership Order*, the Commission established criteria for a waiver of the television duopoly rule for an "unbuilt station."⁴ These criteria are:

- (a) The combination will result in the construction of an authorized, but as yet unbuilt station;
- (b) The permittee has made reasonable efforts to construct, but has been unable to do so; and
- (c) The in-market buyer is the only reasonably available candidate willing and able to acquire the construction permit and build the station, and selling the station to an out-of-market buyer would result in an artificially depressed price.

Ordinarily, the applicant for a failing or unbuilt station duopoly waiver must set forth the efforts to sell the station to an out-of-market buyer. This showing, however, is not required of a waiver applicant that seeks to acquire a station with which it entered into a time brokerage agreement prior to the adoption of the *Local Ownership Order* in August 1999.⁵ Because the time brokerage agreement in this case was entered into in 1996, WPME Corp. need only demonstrate compliance with the first two prongs of the

² Under the Commission's duopoly rule, an entity may own, operate or control two television stations licensed in the same DMA (as determined by Nielsen Media Research) if: (1) the Grade B contours of the stations do not overlap; or (2) if at least one of the stations is not ranked among the top four stations in the DMA in terms of audience share and eight or more independently owned and operating commercial and noncommercial television stations will be licensed in the DMA post-merger. 47 C.F.R. § 73.3555(b). On June 2, 2003, the Commission adopted revised media ownership rules. *In re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13691-92 (2003). The effective date of those rule changes, however, was subsequently stayed by order of the 3rd Circuit Court of Appeals on September 3, 2003. *Prometheus Radio Project v. FCC*, No. 03-3388 (3rd Cir. Sept. 3, 2003) (per curiam). With respect to Section 73.3555(b), the court continued the stay in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004).

³ 47 C.F.R. §73.3555, Note 7.

⁴ See *Review of the Commission's Regulations Governing Television Broadcasting ("Local Ownership Order")*, 14 FCC Rcd 12903, 12941 (1999) (subsequent history omitted).

⁵ See *Review of the Commission's Regulations Governing Television Broadcasting ("Local Ownership Reconsideration Order")*, 16 FCC Rcd 1067, 1077 (2001).

unbuilt station waiver standard. Moreover, applicants such as WPME Corp. may base waiver requests on circumstances as they existed at the time just prior to the parties entering into the time brokerage agreement.⁶ Thus, WPME(TV)'s present operational status is not a bar to WPME Corp. seeking a waiver based on its status as an unbuilt station.

4. An application to construct WPME was initially granted to Kennebec Valley Television, Inc. ("Kennebec") in 1987, following a comparative hearing. None of the owners of Kennebec had any prior broadcast experience. Consequently, Kennebec was unsuccessful in obtaining financing, despite inquiries into numerous private sources of funding. Ultimately, Kennebec filed four requests for extensions of time to construct the station. In 1994, Kennebec assigned the construction permit to New England Television, Inc. ("New England"). Wilson Hickam, who had held a 20% share of Kennebec, was New England's sole shareholder. Despite his best efforts, Hickam remained unable to obtain sufficient funds to construct the station. He was defrauded of \$50,000 by a fundraiser and also suffered a heart attack. In mid-1995, Hickam and Doug Finck, general manager of WPXT(TV), Portland, Maine, began to discuss the possibility that WPXT could help finance and construct WPME in return for the right to provide programming on the station and an option to purchase the station. They signed an agreement generally reflecting these terms in the fall of 1995.

5. Bride Communications, Inc. ("BCI"), at the time the licensee of WPXT(TV), subsequently encountered financial difficulties of its own and was forced into involuntary bankruptcy. Eventually, BCI sold WPXT and its associated assets, including the agreement with Hickam, to Pegasus Communications Holdings, Inc. ("Pegasus"). In January 1996, Hickam executed a time brokerage agreement which formalized the terms of the earlier letter agreement with WPXT. In mid-1996 Pegasus closed on the last part of its multi-step acquisition of WPXT. Doug Finck remained as General Manager and helped Hickam finally oversee the construction of WPME in late 1996 and 1997. All of the financial resources and technical support required to finalize WPME's construction and proposed operation were provided by Pegasus. A license to cover for WPME was filed on August 13, 1997, when the station went on the air. In February 2001, KB Prime purchased WPME from New England. It now seeks to assign it to WPME Corp., another Pegasus subsidiary. In support of its factual showing, WPME Corp. provides sworn declarations of Hickam and Finck.

III. Discussion

6. WPME Corp. asserts that it has satisfied the applicable criteria for obtaining a duopoly waiver based on WPME's status as an unbuilt station. Specifically, it states that WPME was built only after Pegasus acquired WPXT(TV) and an interest in the time brokerage agreement with WPME. According to WPME Corp., without Pegasus's involvement the station would not have been built. Secondly, WPME Corp. points out that the permittees of WPME made reasonable efforts to construct the station, and argues that the Commission recognized these efforts by ultimately granting a total of seven separate requests for extensions of time to construct WPME.

7. WPME Corp. states that the waiver is in the public interest because it will enhance both programming diversity and competition in the Portland-Auburn DMA, and will allow the continued upgrade of WPME's programming and physical plant. WPME Corp. asserts that WPXT and WPME are affiliates of two new networks, WB and UPN, which have historically encountered difficulty finding full-

⁶ *Local Ownership Order* at 12964.

power outlets in markets of this size. Moreover, the two UHF stations had a combined 11.7% of the 2002 television advertising revenues in the market, a figure dwarfed by the 87% obtained by the three VHF stations affiliated with the major networks. Finally, WPME Corp. asserts that the facts in this case are virtually indistinguishable from those in *KB Prime Media, LLC*, where the Commission concluded that a waiver was justified.⁷

8. We will grant the requested waiver. The parties have met their burden under the criteria applicable to this waiver. With regard to the first prong of our unbuilt station waiver standard, the parties have shown that WPME(TV) was unbuilt prior to the involvement of WPXT(TV)'s licensee, and its assumption of the time brokerage agreement. That arrangement enabled the permittee to complete construction of WPME(TV), which was the type of public interest benefit of time brokerage agreements cited by the Commission in the *Local Ownership Order* as warranting a waiver of the ownership rule. As to the second prong, the parties have documented the extensive efforts undertaken by the permittees of WPME in their attempts to construct the station. The Commission found that the explanations given by the permittees in support of their inability to construct were reasonable, as evidenced by the fact that seven separate extension requests were granted.

IV. Conclusion

9. We conclude that WPME Corp. has satisfied both applicable prongs of the unbuilt station waiver standard and that waiver of the Commission's local television ownership rule to permit common ownership of stations WPME(TV) and WPXT(TV) is justified. Having determined that the applicants are qualified in all respects, we find that grant of the application will serve the public interest, convenience, and necessity.

10. Accordingly, IT IS ORDERED, That the request for an unbuilt station waiver pursuant to Note 7 of the Commission's local television ownership rule, 47 C.F.R. §73.3555(b), to permit common ownership of WPME(TV), Lewiston, Maine, and WPXT(TV), Portland, Maine IS GRANTED.

11. IT IS FURTHER ORDERED, That the application of KB Prime Media, LLC and Pegasus Satellite Communications, Inc., Debtor-in-Possession for consent to assign the license of WPME(TV), Lewiston, Maine (File No. BALCT-20040227AAA) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau

⁷ 17 FCC Rcd 6296 (2002).